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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

**PURPLE INNOVATIONS, LLC, A
Delaware limited liability company,**

Plaintiff,

v.

**HONEST REVIEWS, LLC, a Florida
Corporation, RYAN MONAHAN, an
individual, and GHOSTBED, a
Delaware corporation,**

Defendants.

**SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF MOTION FOR ORDER
TO SHOW CAUSE WHY DEFENDANTS
SHOULD NOT BE HELD IN CONTEMPT**


Case No.: 2:17-cv-00138-DB

Honorable Dee Benson

Plaintiff Purple Innovations, LLC ("Plaintiff" or "Purple"), by and through its counsel of record MAGLEBY CATAXINOS & GREENWOOD, respectfully submits this Supplemental Memorandum in Support of Motion for Order to Show Cause Why Defendants Should Not Be held in Contempt. [Dkt. No. 17]. This filing is to inform the Court of what has transpired since March 3, 2017, when Purple filed the Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt (the "OSC

Motion”), including Defendants’ additional violations of the Temporary Restraining Order (the “TRO”) entered by the Court on March 2, 2017. [Dkt. No. 16].

INTRODUCTION

Despite the passage of several days since the entry of the TRO, despite having acknowledged their receipt and knowledge of the entry of the TRO,¹ and in clear violation of the TRO, Defendants Ryan Monahan (“Monahan”), Honest Reviews, LLC (“HMR”), and (“GhostBed”) (collectively, “Defendants”), have now changed Purple’s rating on the www.honestmattressreviews.com website (the “Blog”) from “poor,” which was depicted by a red circle with an X through it, to , the infamous emoji for “poop.”² In addition, Defendants have posted a new “article,”³ entitled “CENSORED BY COURT ORDER” (the “CENSORSHIP ‘Article’”).⁴ The CENSORSHIP “Article” contains numerous false, misleading, and derogatory statements, all of which are unmistakably

¹ That Defendants had notice of the TRO is demonstrated by the new postings discussed herein, which unambiguously and intentionally reference the TRO.

² This is one of two four-letter words commonly associated with this emoji and, as discussed herein, it is likely that Defendants intended to bring the other word to mind.

³ It should be noted that certain materials have been removed from the Blog since the entry of the TRO, in an effort to make it appear as if Defendants are complying with the TRO. In particular, the four “articles” and the “PSA” described in the Complaint [Dkt. No. 2] and the Motion for Temporary Restraining Order (the “TRO Motion”) [Dkt. No. 10] no longer appear on the Blog, and the “Massive Lawsuit ‘Article’” that was posted after delivery of the Complaint has also been taken down. As noted, however, Defendants have simply replaced the old “articles” with new posts that both continue the attack on Purple and are clearly in violation of a court order.

⁴ See <http://www.honestmattressreviews.com/purple-mattress-review/>; see also 3-5-17 capture of “Purple Mattress Review” page, attached as Exhibit “1.”

aimed at using this lawsuit and the TRO to further malign Purple and proclaim that Monahan and HMR are being unfairly “censored.” For example, the CENSORSHIP “Article,” *inter alia*, accuses Purple’s counsel of lying, calls Purple’s counsel “a pretty slimy piece of crap,” and labels Purple as “SLAPP SUIT FILING SCUMBUCKETS.”⁵ See *id.*, Ex. 1. The “article” further declares that “[I]f you buy a mattress from [Purple], you’re 🤡 on the **First Amendment**.” See *id.* (emphasis in original), Ex. 1.⁶ The Article goes on to suggest that Court was tricked by Purple and issued an order that is “unconstitutional:”

This order is unconstitutional. Any lawyer who would ask for something this clearly unconstitutional is a pretty slimy piece of crap — even for a lawyer. **We expect that once the judge in the case sees what garbage they stuck under his nose to sign, the judge will bench slap them like a side of beef.** But, until then, there is a Federal Court order in place, and well, we’re not about to disregard a court order — not even an unconstitutional one.

Defendants’ new posts and the CENSORSHIP “Article,” which were added to the Blog *after* Purple submitted the OSC Motion [Dkt. No. 17], and which acknowledge receipt of the TRO, are in clear violation of at least two provisions of the TRO. First, Defendants’ actions are clearly designed to circumvent the purposes of the TRO, which include stopping irreparable harm to Purple, as reflected in Paragraph 9(e):

⁵ Defendants’ posts strongly indicate that they intend to raise a defense under the Utah Participation in Government Act (the “Utah Anti-SLAPP Act”), Utah Code Ann. §§ 78B-6-1401 through 78B-6-1405, or to argue that their “speech” is protected by the First Amendment. However, neither the Utah Anti-SLAPP Act nor the First Amendment has any application in this case, and neither protects against the false and misleading statements made in commerce by Defendants here.

⁶ Notably, none of the new materials posted by Defendants address the affiliation between HMR, Monahan, GhostBed.

(e) Defendants shall not attempt to circumvent the intent of this Order by make new statements about Purple or its products which are false and misleading and convey the same substantive message as in the statements referenced in preceding sub-paragraphs (a)-(c), including through the “clever use of innuendo, indirect intimations, and ambiguous suggestions.” *Cotrell, Ltd. v. Biotrol Int’l, Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999) (citations omitted).

TRO ¶ 9(g) (emphasis added). [Dkt. No. 16]. Second, Defendants’ actions violate Paragraph 9(g), which unequivocally prohibits Defendants from:

making false, misleading, or confusing posts or discussions on social media or otherwise about the existence of this lawsuit, the Court’s temporary restraining order or other any other orders that may be issued by the Court, or about Purple’s efforts in this lawsuit to restrain Defendants from continuing to engage in the conduct at issue, in an attempt to circumvent the purpose of the injunctive relief sought by Purple.

TRO ¶ 9(g) (emphasis added). [Dkt. No. 16]. This additional contumacious conduct, which threatens to cement the irreparable harm already done to Purple and its goodwill, shows that Defendants are not only in contempt, but Purple’s predictions in the OSC Motion that Defendants would attempt to circumvent the intent of the Court’s TRO have proven to be true. This new conduct provides additional support for the swift entry of an order to show cause, including mandating disclosures by the Defendants about their relationships to each other, and allowing expedited discovery.

As noted *supra* in footnote 6, it is telling that Defendants continue to fail to disclose to consumers or otherwise address the past and present association of Monahan with Purple’s competitor GhostBed, including Monahan’s *current* status as an employee of GhostBed’s marketing department, his office at GhostBed’s headquarters in Florida, his telephone extension at that office, and the ability to contact Monahan at

marketing@ghostbed.com. See generally Declaration of Tom E. Zoller in Support of Motion for Temporary Restraining Order, Dkt. No. 11-1.

Purple believed that when Defendants posted the “Massive Lawsuit” article, which was also in violation of the TRO, the court would already have been “justified in saying that enough is enough.” *Morton v. Continental Baking Co.*, 938 P.2d 271 (Utah 1997) (emphasis added). At this point, however, there is even more justification to do so.

STATEMENT OF ADDITIONAL FACTS

The HMR Blog’s Home Page

The home page of the Blog now includes an image of a man in a black suit holding up a law enforcement badge, across which appear the words “CENSORED BY COURT ORDER” in large, red, all-capitals text:



See www.honestmattressreviews.com ; see also March 5, 2017 capture of home page, attached as Exhibit “2.” Clicking on the image takes the reader to the CENSORSHIP “Article.”

Also on the home page is an image that had previously appeared on the Blog in connection with the “Massive Lawsuit ‘Article’”⁷ but now has different text surrounding it. The image is of a man with tape across his mouth that reads “FREEDOM” in large red letters, which is accompanied by a title declaring that a court order is prohibiting HMR from reviewing Purple and a link inviting the reader to “click here” to “see why” HMR’s reviews of Purple are not permitted:



⁷ See OSC Motion at 3 [Dkt. No. 17]; Ex. 2 to OSC Motion. [Dkt. No. 17-3]. While the “Massive Lawsuit ‘Article’” appears described in the OSC Motion appears to have been taken down, the post of that article and the campaign (the “Campaign”) for funding to defend the lawsuit continue to appear on the GoFundMe website at <https://www.gofundme.com/purplesueshonest>. Accordingly, the Court should order Monahan to remove the Campaign from the GoFundMe site.

See *id.* Clicking on this link also leads to the CENSORSHIP Article.

The “Reviews” Page of the HMR Blog

The “Reviews” tab of the HMR Blog now lists Purple at the very top of the lengthy list of mattress companies that HMR purports to review, except that now in place of the red circle with an X depicting the “poor” rating it previously gave to Purple, an image of the poop emoji appears, along with the word “CENSORED” and the phrase “NO RATING DUE TO COURT ORDER” in red all-capital letters:



See <https://www.honestmattressreviews.com/mattress-reviews/>; see also 3-5-17 HMR Reviews Tab Capture, attached as Exhibit “3.” Clicking on the blue “Review” box to the far right of the line concerning Purple leads to the CENSORSHIP “Article.”

The CENSORSHIP “Article” on the Purple Mattress Review Page

Like the HMR Home Page, the “Purple Mattress Review” Page, which now prominently features the CENSORSHIP “Article,” begins with the image of the law enforcement officer holding up a badge, with the “CENSORED BY COURT ORDER” text appearing over the image:



See CENSORSHIP “Article,” Ex. 1.

Appearing beneath this image is the text of the CENSORSHIP “Article,” which as noted is incendiary, provocative, and highly accusatory of both Purple and its counsel.

Among other things, the “article” states that:

- the TRO is unconstitutional;
- this lawsuit is nothing more than a SLAAP suit;
- Purple is trying to “sue the negative reviews out of existence” and Purple and its counsel are “SLAAP SUIT FILING SCUMBUCKETS;” and
- Purple’s counsel is lying and a “pretty slimy piece of crap,” and when the judge “sees what garbage they stuck under his nose to sign, the judge will bench slap them like a side of beef.”

Id. The complete text of the CENSORSHIP “Article” appears as follows:

The Purple Mattress company has sued us for defamation because they were not happy with the content of our reviews. **They then went into court, without us present or represented, and fed the judge a bill of goods.** You see, when you seek a temporary restraining order, the judge usually trusts the lawyer that he isn't lying or asking for *something unconstitutional*.

This temporary order commands that we take down all reviews, and even cease rating this company with a rating of "Poor." Yes, indeed, we are no longer even permitted to rate this company as Poor. I guess we will change its rating to "💩."

This order is unconstitutional. Any lawyer who would ask for something this clearly unconstitutional is a pretty slimy piece of crap — even for a lawyer. **We expect that once the judge in the case sees what garbage they stuck under his nose to sign, the judge will bench slap them like a side of beef.** But, until then, there is a Federal Court order in place, and well, we're not about to disregard a court order — not even an unconstitutional one.

That all said, you need to ask yourself if you would buy a mattress from a company that wants to suppress consumer reviews with a SLAPP suit. Do you trust a company that, rather than compete in the marketplace, decides that it will just try and **sue negative reviews out of existence?**

They have, temporarily, succeeded in getting this review down. **But, we are going to court, where we are going to fight for the First Amendment, and the right to bring you our honest consumer reviews.**

In the meantime, we won't call the Purple Mattress company "poor". But, we will call them SLAPP SUIT FILING SCUMBUCKETS. And, if you buy a mattress from them, you're 💩 on the **First Amendment.**

[Read The Order Here](#)

See *id.*, Ex. 1.

At the end of the CENSORSHIP “Article” is a blue box surrounding the words

Read The Order Here

“Read The Order Here.” . Clicking on the box pulls up an image of the TRO, further demonstrating Defendants’ awareness of the TRO.

As with the “articles” addressed in the Complaint [Dkt. No. 2] and TRO Motion [Dkt. No. 10], the CENSORSHIP “Article” is presented as if it is “news,” further misleading consumers as to the purported legitimacy of the contents of the “article” and the Blog as a whole:



See id.

Additional / Continued Violations of the TRO

In addition to the new posts, Purple continues to display on the Blog numerous false and misleading statements and articles in violation of the TRO, further supporting the issuance of an order to show cause, including portions of the “articles” that the Court ordered be taken down from the Blog and other places on the web.

For example, portions of the posts which the Court ordered taken down are repeated in an “article” entitled “Sleepopolis Sends Us To YouTube’s Copyright School

Rather Than Focusing On Consumer Safety” (the “Sleepopolis ‘Article’”). This “article” is accessible from the HMR home page, among other places on the Blog, appears under the headings “BREAKING NEWS” and “INDUSTRY NEWS,” and represents yet another clear attempt to circumvent the Court’s TRO:



Sleepopolis Sends Us To YouTube's Copyright School Rather Than Focusing On Consumer Safety

The article includes much of the same text that previously appeared in the “articles” that were ordered to be removed in the TRO:

With that, we regret to inform you that until Purple Mattress discloses to consumers that they will be subjected to and directly inhaling a white powder substance that could be damaging to those with respiratory issues we're going to revoke our endorsement of this mattress. We value consumer knowledge and safety far greater to our organization that funny videos and made up tests.

Once Purple publishes supporting documentation for consumers about the safety of this substance used in the context in which they use it, we will reinstate our recommendation. As a consumer, you have the right and responsibility to research your mattress before you complete your purchase. We're not saying that you should not buy a Purple Mattress. What we are clearly saying is that until consumers are properly informed of this substance we are revoking our recommendation.

If this Powder is completely brand new to you here are some reference articles

| [***What Exactly Is That White Powder On Purple's Mattress?***](#)

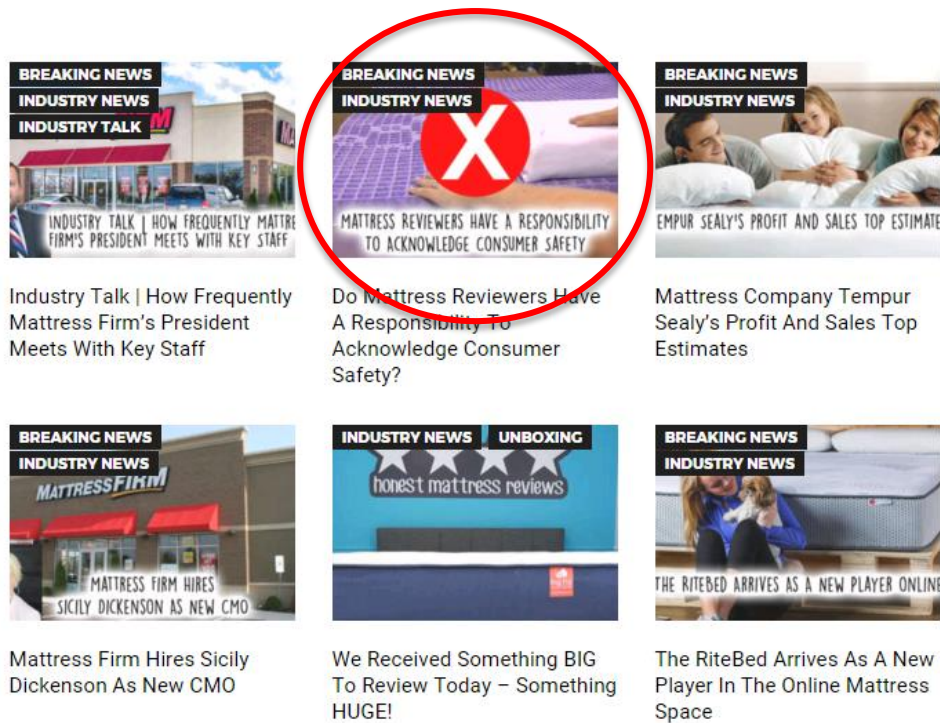
| [***A Deeper Investigation Into Purple Mattress & Pillows White Powder***](#)

| [***PSA – Due To Purple's Unknown Powder We're Revoking Our Endorsement***](#)

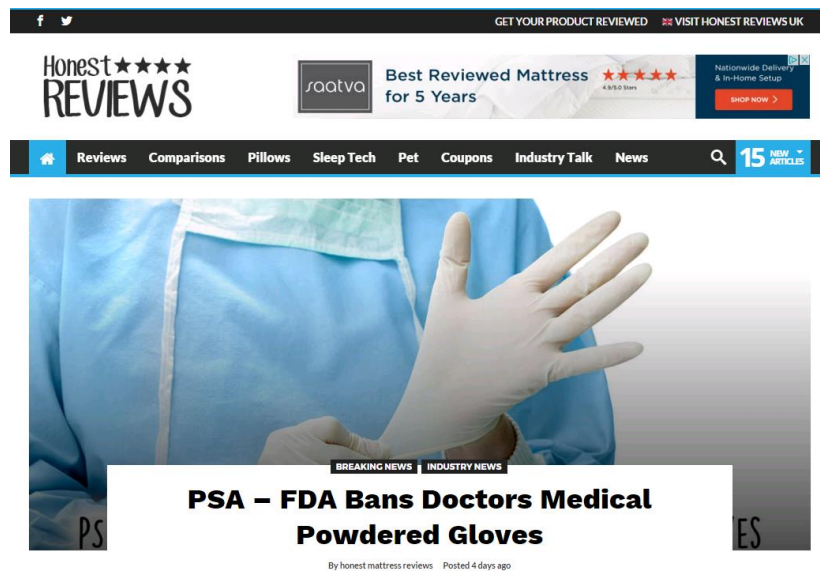
| [***Purple's Acknowledgement Of The White Powder STILL Misleads Consumers***](#)

See www.honestmattressreviews.com/sleepopolis-purple-mattress-review/; see also 3-6-17 web capture of Sleepopolis "Article," attached as Exhibit "4."

As another example, as of March 5, 2017, a link to the "Responsibility 'Article'" discussed in the Complaint and TRO Motion still appeared on the Blog's home page:



The Blog now includes what purports to be a “PSA” about the FDA ban on powdered gloves, represented as “INDUSTRY NEWS,” which clearly is tied to Purple and represents yet another attempt by innuendo to suggest that Purple’s products are not safe:



See <https://www.honestreviewscompany.com/fda-bans-powdered-gloves>; see also capture of PSA attached as Exhibit “5.” If Purple was not a target of Defendants’ smear campaign, it seems highly unlikely that an article about “powdered” gloves used in medical settings would appear on a review site for mattresses.

ARGUMENT

Defendants are contempt of the TRO, and they show no signs that they intend to comply with that order. Rather, Defendants continue to demonstrate the wisdom of the Lanham Act’s prohibition against conveying false and misleading statements, including through the “clever use of innuendo, indirect intimations, and ambiguous suggestions.” *Cotrell, Ltd. v. Biotrol Int’l, Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999) (citations omitted).

The facts set forth above reveal that, even though Defendants have removed from the Blog certain offending “articles” and images, they have taken no further steps to comply with the TRO, instead electing to fan the flames and thereby undermine the very purpose of the TRO. Indeed, the TRO – a temporary order designed to stop irreparable harm pending a preliminary injunction hearing – is directly aimed in this case at preventing the very type of conduct in which Defendants are now engaged. Defendants’ latest internet postings show that they are attempting to paint Purple as being afraid of competition and having filed a frivolous lawsuit to stop Defendants’ alleged “free speech,” when in reality Purple is trying to prevent irreparable harm to its reputation and goodwill caused by false and misleading statements and innuendos that are not only causing harm to Purple but also to the consumers Defendants claim they are helping. Consumers are not aided however, when they are intentionally mislead

and confused, for transparently competitive purposes,⁸ intentionally confuse and mislead consumers into thinking they have independently investigated and found Purple's products are harmful. These contumacious posts present and a new and dire threat to Purple and its goodwill.

As set forth in the TRO Motion [Dkt. No. 8] and the Supplemental Memorandum in Support of Motion for Temporary Restraining Order [Dkt. No. 11], Defendants, working in concert, first attempted to unfairly compete by falsely and misleadingly accusing Purple's products as being dangerous and unsafe, and by misleading and confusing consumers into believing that their reviews of mattress companies – including their extremely favorable review of Defendant and Purple competitor GhostBed – are entirely neutral, independent, and unbiased. Now, having temporarily been restrained from that misconduct, Defendants are taking a new tack, which is expressly in violation of the plain language of TRO. In pertinent part, the TRO provides as follows:

Defendants are hereby restrained from making false, misleading, or confusing posts or discussions on social media or otherwise about the existence of this lawsuit, the Court's temporary restraining order or other any other orders that may be issued by the Court, or about Purple's efforts in this lawsuit to restrain Defendants from continuing to engage in the conduct at issue, in an attempt to circumvent the purpose of the injunctive relief sought by Purple.

TRO ¶ 9(g) (emphasis added). [Dkt. No. 16].

⁸ And Defendants' actions are all the more misleading, when Defendants continue to hide the fact that Defendant Monahan actually works in GhostBed's Marketing Department.

The conduct described above indisputably falls within and violates the ambit of this paragraph. Defendants are posting “false, misleading, and confusing” materials on the internet, and the materials posted by Defendants expressly and unabashedly reference the “existence of this lawsuit, the Court’s temporary restraining order . . . , [and] Purple’s efforts in this lawsuit to restrain Defendants from continuing to engage in the conduct at issue.” *Id.* Moreover, all of the new materials posted by Defendants represent exactly what is prohibited by the TRO, namely, an “attempt to circumvent the purpose of the injunctive relief sought by Purple.” *Id.*

Defendants’ most recent actions, which ironically acknowledge the existence of the TRO, are not only in direct violation of the TRO, but they present a serious challenge to the Court’s authority. Defendants suggest the Court has acted improperly, assert that the TRO is “unconstitutional,” and claim that the Court was easily tricked by the “lies” of Purple’s counsel. However, disagreement with a court order, or even a legitimate belief that an order is unconstitutional, do not allow a party to ignore or violate the order. Defendants are now delivering the false message that Purple is intentionally misleading the Court, trying to hide truth from its customers, and is an enemy of free speech, all the while fail to acknowledge their own contribution to these circumstances, including their unmistakable efforts to evade service of process.

Defendants’ recent posts and continued use of portions of the posts expressly ordered to be taken down by the Court are also clearly in violation of Paragraph 9(e), because they represent new false and misleading statements designed to circumvent the purpose of the TRO and cause additional harm to Purple:

(e) Defendants shall not attempt to circumvent the intent of this Order by make new statements about Purple or its products which are false and misleading and convey the same substantive message as in the statements referenced in preceding sub-paragraphs (a)-(c), including through the “clever use of innuendo, indirect intimations, and ambiguous suggestions.” *Cotrell, Ltd. v. Biotrol Int’l, Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999) (citations omitted).

TRO ¶ 9(g) (emphasis added). [Dkt. No. 16].

Again, as set forth in the OSC Motion and for the additional reasons addressed herein, each of the elements for civil contempt is met. A valid order exists, Defendants had knowledge of it, and yet they have disobeyed it. See *Bad Ass Coffee Company of Haw., Inc. v. Bad Ass Coffee Ltd. P’ship*, 95 F. Supp. 2d 1252, 1255 (10th Cir. 2000) (listing the three elements of civil contempt). Therefore, due to the additional contumacious conduct addressed herein, an order to show cause is warranted, Defendants are in contempt, and Purple is entitled to the relief set forth in the OSC Motion and the Proposed Order to Show Cause [Dkt. No. 17-1] filed on March 3, 2017.

CONCLUSION

For all of the foregoing reasons and for those set forth in the OSC Motion, Purple respectfully asks the Court to grant the OSC Motion and issue the relief requested therein, as well as fashion any additional relief which the Court deems appropriate to protect the Court’s authority, in the face of Defendants contumacious – indeed disrespectful – conduct.

DATED this 6th day of March, 2017.

MAGLEBY CATAXINOS & GREENWOOD

/s/ James E. Magleby

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Christine T. Greenwood

Adam Alba

Attorneys for Plaintiff Purple Innovations, LLC

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MAGLEBY CATAXINOS & GREENWOOD, 170 South Main Street, Suite 1100, Salt Lake City, Utah 84101, and that pursuant to Rule 5 of the Federal Rules of Civil Procedure, I served copy of the foregoing **SUPPLEMENTAL MEMORANDUM IN SUPPORT MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT** upon the following by ECF and/or electronic mail on this 6th day of March, 2017:

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